LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OF AMERICA

OCTOBER TERM, 1967

No. 590

ROBERT GRAHAM GRAY,

Appellant,

vs.

MARIE GRAY PORTER
(FORMERLY: MARIE K. GRAY),

Appellee.

Petition for a Writ of Certiorari to the Court of Appeals of Maryland.

BRIEF FOR THE APPELLANT

ROBERT GRAHAM GRAY
708 First Colonial Road
Virginia Beach, Virginia

PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	11

IN THE

Supreme Court of The United States

OF AMERICA

OCTOBER TERM, 1967

No.

ROBERT GRAHAM GRAY,
Appellant,

vs.

MARIE GRAY PORTER
(FORMERLY: MARIE K. GRAY),
Appellee.

Petition for a Writ of Certiorari to the Court of Appeals of Maryland.

BRIEF FOR THE APPELLANT

OPINIONS BELOW

There were no reports of the trial court's decisions; however, copies of the opinions that are pertinent to the issues raised herein appear in the Appendix.

The appellant is not advised as to whether the decision of the Court of Appeals of Maryland, entered in the September Term, 1966, has been reported; however, a copy of the said opinion also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered in the September Term, 1966; and there were no petitions for rehearing filed therein. A decree was entered by the Court on the 9th day of May, 1967, staying the execution of the judgment until the 11th day of July, 1967, to allow the appellant to petition this Honorable Court for a Writ of Certiorari; however, pursuant to appellant's application, an order was entered by this Court on the 11th day of July, 1967, wherein the time for filing a petition for a Writ of Certiorari was extended to and including the 8th day of September, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

Whether the failure of the trial court to proceed with a hearing on the merits in a divorce action, on the scheduled date for such hearing, and the continuance and subsequent hearing on the next day, without notice to the defendant in said cause, nor upon the agreement of Counsel; constitutes a violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The appellee herein, Marie Gray Porter, then Marie K. Gray, instituted a divorce action in the Circuit Court for Allegany County, Maryland, against the appellant herein on the 6th day of February, 1956. At this time the appellee was a nonresident of the State of Maryland, and service against him was obtained by Order of Publication, and a decree pro confesso was entered against him on the 11th day of April, 1956, and testimony taken pursuant thereto. Subsequently, after leave of Court was obtained, an answer was filed by Counsel on behalf of the appellant on the 10th day of May, 1956. The appellant was subsequently notified by his then attorney, Edward J. Ryan, on the 12th day of May, 1956, that the matter had been dismissed (RT - 3). Subsequently, he was notified by Counsel on the 26th day of July, 1957, that the matter was set for hearing on the 29th day of July, 1957; however, the appellant had notified the attorney that had previously represented him, that he no longer desired his representation in the matter (RT - 6, 7, & 8); and that he would be present at the trial. Appellant appeared at the Courthouse of the Circuit Court for Allegany County, Maryland, on July 29, 1957, and found that the matter was not scheduled for

hearing, nor was there a hearing held on this matter on that date (RT - 3, 12). On or about the 3rd day of August, 1957, appellant was informed that a decree had been entered granting the appellee herein a divorce a vinculo matrimonii and awarding her alimony in the sum of Twenty Dollars ($20.00) per week.

On July 21, 1964, a petition was filed to revise the final judgment of the Circuit Court for Allegany County, Maryland, entered on the 30th day of July, 1957 (APP. 1a.); wherein it was alleged that the hearing on the merits of the case were conducted without due and timely notice, and accordingly, the decree based thereon was tainted with fraud and denied him his right to due process of law. Subsequently, in response to a show cause order entered by the Court, an answer was filed by the appellee herein on the 4th day of August, 1964.

Subsequently, on the 4th day of March, 1965, the matter came on for hearing before the Court, and at the conclusion thereof, a decree was entered by that Court wherein the petition was dismissed (APP. 2a.).

REASONS FOR GRANTING THE WRIT

Appellant has, and will in this proceeding, basically rely on his contention that the decree entered in the Circuit Court for Allegany County, Maryland, on the 30th day of July, 1957, due to the fact that the hearing upon which it was based, without due or proper notice to him, was a void, and not a voidable decree. Accordingly, he contends that he was not then, nor is he now, bound by the Maryland Rules of Court insofar as they pertain to final judgments and the revisory power of the courts over

such judgments. For the same reason, he further contends, as he did in the court below, that he cannot be guilty of laches.

From the foregoing, appellant's argument will be divided into two subjects, and submitted for the Court's consideration in the order listed:

1.) Does the guarantee of the Fourteenth Amendment to the Constitution of the United States, insofar as the right to due process of law is concerned, render a final judgment or decree void when the same is based on a hearing, of which there is no recorded transcript preserved in the record; and when the same was conducted on a date and time of which the defendant in the cause was not given due or proper notice?

2.) Does the entry of a final decree by a trial court, where the hearing upon which the same was based was conducted without due process of law, in that the defendant in the cause was not given notice of the hearing, and the same was not conducted by agreement of counsel, render such decree merely voidable or void ab initio?

There appears to be a great deal of conflict as to when the actual hearing was held in the trial court pursuant to the bill of complaint and the issues joined upon the filing of an answer by the appellant herein. However, there is nothing in the record to show that there was a hearing held in the Circuit Court for Allegany County, Maryland, on the 29th day of July, 1957.

The record and the transcript of the hearing held in that Court on the 4th day of March, 1965, on the petition to revise final judgment, would indicate that

there was not a hearing, or trial on the merits, in the original instance held on July 29, 1957; but that the same was held on July 30, 1957. At no place in the record or transcript of the latter hearing is it even suggested that notice was given to the appellant of a hearing on that date, nor that the same was held pursuant to agreement of Counsel.

The opinion of the trial court on the appellant's Petition to Revise Final Judgment, that was rendered and filed March 3, 1965 (APP. 2a.), merely states that there was nothing in the testimony to justify the recision of the divorce decree passed on July 30, 1957, and further held that the appellant was guilty of laches. It is well to note that there is no finding by the court that the original hearing was in fact held on July 29, 1957; nor is there anything in the record upon which to base a presumption, rebuttable or otherwise, that this hearing was in fact held on that date.

With reference to the date of the original hearing, the transcript reveals from the testimony of Robert Graham Gray, no hearing was held on that date: "—I came here and there was no case of July 29th", (RT - 3). On cross-examination, Gray's testimony again set forth the fact that there was no hearing on that date: "—I appeared and there was no trial, and I called Mr. Speir Cook and he told me there was no case here to be heard in court so I don't know nothing about this divorce case on July 30th until I got that judgment put against me." (RT - 12)

Counsel for the appellee herein, the complainant in the trial court, referred to an oral opinion by the trial

judge, contending that the same was filed on July 29, 1957:

"Mr. Manges: We offer in evidence the oral opinion of court by Judge Harris filed on July 29, 1957.

The Court: Well, I assume it would be part of the record in the divorce proceedings.

Mr. Manges: But, I believe, in the event of any appeal, it must be formally offered in evidence in this proceeding at this time.

Mr. Sullivan: We don't object.

Mr. Manges: We also offer the exhibit in evidence. For the record, I am offering the opinion of court in order to show at what stage of the proceeding Mr. Ryan struck his appearance or made an effort to strike it.

That is our case.

The Court: There seems to be some dispute. I think in your opening statement you said the decree was signed July 30th; is that correct?

Mr. Manges: Yes, sir.

The Court: Hearing was on the 29th.

Mr. Sullivan: We are saying that the hearing was on the 30th, the same day the decree was signed.

The Court: There is nothing to show that it wasn't.

Mr. Manges: The oral opinion was filed on the 29th. The Court Reporter could check his notes, I believe, probably, and find that is correct.

The Court: What is the date of the decree? Can any of us agree on that? I can look it up here.

Mr. Sullivan: July 30th.

Mr. Manges: I feel sure the memorandum opinion is on the 29th. The oral opinion of court, if the court please, was filed on July 29, 1957, and the decree the following day."

(RT 13-15). The original decree was entered on the 30th day of July, 1957; accordingly, it must be presumed; when the testimony of Mr. Gray is considered, then being nothing in the record to contradict his contention that there was no hearing on the 29th, that the hearing was held on the 30th of July, 1957. There is nothing in the record, nor is it even contended that there was notice given of a hearing on the 30th of July, 1957, or that such a hearing was held on that date pursuant to agreement of counsel.

All of which appellant contends falls within the rule set forth in the 17 Am. Jur., *Divorce and Separation*, Section 494:

> "If, on the other hand, the defendant did not have notice and an opportunity to defend the action, or if he was prevented or dissuaded from defending by duress, fraud, accident, or mistake, he may have the decree vacated on the ground of such duress, fraud, accident, or mistake."

2.) Does the entry of a final decree by a trial court, where the hearing upon which the same was based was conducted without due process of law, in that the defendant in the cause was not given notice of the hearing, and the same was not conducted by agreement of counsel, render such decree merely voidable or void ab initio?

The decision of the Court of Appeals of Maryland, entered and filed, per curiam, on the 12th day of April, 1967 (APP. 3a.), completely avoids the issue of when the hearing on the divorce proceeding was held, and to all intents and purposes based its opinion on the rules of court as regards the control of the court over final decrees. Apparently Rule 671, as set forth in the opinion, of the Maryland rules would leave the decree in the breast of the Court, and subject to modification for a period of 30 days; however, appellant contends that this in no way governs the issues raised herein. The court goes on to distinguish between a bill of review and an original bill for fraud. Here, again, the court has avoided the issue of whether the case was heard on the merits on the 29th or 30th day of July, 1957, and whether the same was heard after due and proper notice to the defendant therein.

Notwithstanding the reasons posed and set forth by the Court of Appeals of Maryland, as to how the decree was attacked, the question of the failure of due and timely notice was not passed on by the court. It is admitted that if this defect should only render the judgment voidable, the same would afford the same effect as if it were a valid one until it is reversed or vacated. (30A *Am. Jur., Judgments,* Section 44, p. 197)

In this respect appellant contends that the judgment was not merely voidable, but void ab initio, due to the fact that the original hearing was had, if in fact there was such a hearing, without due and proper notice to him. Accordingly, it is submitted that he, the appellant, was not bound by the various rules and procedure upon which The Court of Appeals of Maryland based its opinion; and particularly that he was not bound to resort to the appellate procedure to which the court referred.

The greater weight of authority as regards void judgments, which appellate submits is applicable under the existing facts, is set forth in 30A. *Am. Jur., Judgments,* Section 45, p. 197:

> "A void judgment is not entitled to the respect awarded a valid adjudication, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. — It has no legal or binding force or efficiency for any purpose or at any place. It cannot affect, impair, or create rights. — It may be attacked by a person adversely affected by it, in any proceeding, direct or collateral, and at any time. All proceedings founded on the void judgment are themselves regarded as invalid."

Appellant further contends, the judgment complained of being a void one as opposed to voidable, that he cannot be deemed guilty of laches. The generally accepted rule, as set forth in 30A *Am. Jur., Judgments,* Section 693, p. 659, holding that the defense of laches is not available against a motion to open or vacate a void

judgment, for the reason that no amount of acquiescence can make it valid.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT GRAHAM GRAY